YAHAYA ABD. WAHID

v.

KOL. LAI CHONG WAH (KOMANDAN) & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. 1224 OF 1977]
18 APRIL 1985

TORT: *Negligence - Insufficient warning of dangers - Illegality of defendant's act - Liability for consequences which followed - Defence - Volenti non fit injuria - Plaintiff's own carelessness - Apportionment of liability.*

The plaintiff was employed by the 2nd defendant (The Government of Malaysia) as a civilian driver at Ulu Tiram Camp, Kota Tinggi, Johor, a protected area used by the 2nd defendant, to train its soldiers in weapon training and jungle tactics. The 1st defendant was a Commandant of the Camp at the material time.

As a civilian driver, the plaintiff's duties were primarily to ferry soldiers and civilians to the various firing ranges.

On the morning of 14 August 1975, after his remaining passengers had alighted at the Workshop of Electric Target Range, the plaintiff instead of joining the other staff at the Workshop for breakfast as he normally would, drove down to a stream a mile south as he needed to use the toilet badly and there was no running water at the one in the Workshop.

On the way back to the Workshop, the Land Rover which the plaintiff was driving skidded and its front and rear wheels got stuck in the mud. With the help of a few pieces of wood, the plaintiff managed to get the Land Rover out of the mud, whereupon he returned towards the Workshop together with an object which he found while he was looking for the wood.

Subsequently, while carrying the object back to the Workshop he missed a step, tripped and fell into an open drain, and the object he was carrying exploded in his hand, resulting in severe injuries to his person.

The plaintiff then brought an action against the defendants, alleging that they had been negligent in failing to provide him with a safe place and a safe system of work. Nuisance was also pleaded as an alternative cause of action but was not alluded to in the course of the trial.

Held:

[1] Having considered the evidence, in all probability, both the superior officers of the plaintiff had reached the same negative attitude that since the plaintiff was only one of the 12 or 15 civilians under their control, and the nature of his work was in no way dangerous and the possibility of blinds (unexploded bombs) being detected outside the target areas was minimal, there was no necessity for any safety precautions to be explained to him. Moreover, the danger notices displayed were issued only after the date of the accident. Thus, there was insufficient and inconclusive evidence that the plaintiff had been warned of the dangers.

[2] At the material time, there was a Fund in existence set up for the benefit of the civilian staff, which source of income was the proceeds of sale of empty casings or other metallic objects found and collected by the civilian staff. From the evidence, such items were the

property of the 2nd defendant and they could only be collected by 2 categories of personnel who were accountable for such collections to the Quarter Master. These metallic casings could not leave the Camp under any circumstances nor could they be sold. Therefore, the creation of the Fund itself was an illegal act. However, such illegality on the part of the plaintiff's master had no effect on the plaintiff in that he had the expressed authority to pick up the unexploded bomb which could be sold and the proceeds deposited with the Fund, and to that extent the defendants were liable for the consequences which followed.

[3] There was no evidence to show that the plaintiff was aware that the object was a live-bomb and if he had suspected it was a bomb, it was doubtful that he would have gone anywhere near it. Being unaware of the presence of danger, it could hardly be said that he consented to run such danger. Therefore the defence of *volenti non fit injuria* was inapplicable.

[4] The bomb would not have exploded had it not hit the cement floor of the open drain when the plaintiff tripped into it. By being careless himself, the plaintiff had contributed to his own misfortune and to that extent the liability was apportioned 50:50.

[Judgment to plaintiff. Plaintiff awarded RM48,500 as general damages on 50:50 basis. Interest at 6% per annum on above from service of writ until date of judgment. Plaintiff awarded (on 50:50 basis) RM2,500 for loss of earning capacity and RM12,087 being costs of prosthesis and charges for servicing same. No interest on above two items. Costs to plaintiff in any event.]

Cases referred to:
Lee Song Seng v. Leong Hup Transport Company & Another [1975] 2 MLJ ii
Jamaliah binti Mohamad (infant) v. Ng Fook Seng [1982] 2 MLJ xlviii
Abdul Hamid v. Ooi Teik Ean & Another [1979] 1 MLJ 244
Gary Louis Powell v. Ng Cheng Tee [1979] 1 MLJ xxxix

For the plaintiff - R.K. Nathan
For the defendants - Abdul Hamid Said; FC

JUDGMENT

Siti Norma Yaakob J:

On 14 August 1975, when this cause of action arose, the plaintiff was employed by the second defendant as a driver at the Ulu Tiram Camp, Kota Tinggi, Johor, a protected area used by the second defendant, to train its soldiers in weapon training and jungle tactics. The first defendant was a Commandant of the Camp at the material time.

The plaintiff was one of 4 civilian drivers and he had been transferred to the Camp on 1 January 1975. As a civilian driver, he was assigned to one of the Army vehicles and his duties were primarily to ferry soldiers and civilians to the various firing ranges.

On the morning of 14 August 1975, he was driving Land Rover Z6912 with 8 civilians and 1 soldier on board. He first drove them to the main gate where, one civilian got off. He proceeded further to an area called "DART KAWASAN MERAH" where 3 civilian got off. He then back tracked south towards a building known as the Workshop of the Electric Target Range (ETR) where his remaining five passengers alighted. On a normal day he would have joined the other staff at the Workshop for breakfast but that very morning he needed to go to the toilet badly and as there was no running water at the one in the Workshop, he decided to use a stream that was a mile away south of the Workshop.

After he had finished his business at the stream, the plaintiff got back into the Land Rover intending to go back to the Workshop. As he was negotiating a bend, the Land Rover skidded and its right front and rear wheels got stuck in the mud. As he was alone he decided to look for some pieces of wood as a means of getting the Land Rover out of the mud. Whilst he was looking for these pieces of wood, he came across an object on the ground. He picked it up and placed it in the Land Rover intending to take it back with him.

After having found the pieces of wood and placing them close to the wheels of the Land Rover that were stuck in the mud, he managed to steer the vehicle on to the pieces of wood and out of the mud and he proceeded to drive back to the Workshop together with the object placed safely on the seat next to him. This time he approached the Workshop building from the rear and he parked his vehicle under a shade. Carrying the object in his hand he proceeded towards the front of the Workshop and to reach it he had to cross an open drain that runs around the building. As he was walking towards this open drain he heard his name being called and on turning back he missed a step, tripped and he fell into the open drain and the object that he was holding exploded in his hand, resulting in severe injuries to his person. He now claims damages from the defendants alleging that they had been negligent in failing to provide him with a safe place and a safe system of work. The plaintiff had also pleaded nuisance as an alternative cause of action but as this was not eluded to in the course of the trial, he appears to have dropped this plea altogether and he relies solely on the common law claim of negligence.

The defendants on the other hand raised three defences in their Amended Statement of Defence:

(1) a denial of total liability.

(2) alternatively, if they are held to be liable, the plaintiff had contributed to the negligent act, and

(3) *volenti non fit injuria*.

On the facts as disclosed, there is no doubt whatsoever that the object found by the plaintiff and which exploded in his hand was for want of any better word an "unexploded bomb" or a "blind" as is commonly known among the Armed personnel. The place where the plaintiff found it is a jungle area along the side of a track and about 2 to 3 miles from the target areas. How it got to be there is anybody's guess but the first defendant, DW1 ventured three possibilities,

(1) that it was removed by someone from any of the target areas,

(2) it could have been carried by an animal, and

(3) it could have escaped the target areas and landed where the plaintiff found it, a possibility he rated at only 1%.

However, he considered it highly improbable for any of the three possibilities happening as the target areas are prohibited areas, closed to civilian and Army personnel alike. Moreover, care had been taken to see that no live ammunition used in the target practices is allowed to stray outside the target areas as these areas are fairly sizeable and are clearly demarcated and sufficient calculation and space had been provided so that the ammunition lands within the demarcated target areas.

However, DW1 who had been the Camp's Commandant since October 1970 when the second defendant took over the Camp from the British Army, admitted possibility of blinds being present anywhere within the 8,000 acres area as the Camp was used extensively by the British Army during the war and the early Emergency. He had also acknowledged this fact in the Standing Orders, D6, which he prepared and para. 13 of D6 warns all Army personnel to be on the look out for any blinds found in the ranges and if such a blind is discovered, its position was to be marked and the matter reported to the Range Liaison Officer. However, as he had declared D6 to be a restricted document, he had left the matter of conveying the contents of it to the integrity of each Head of Department in the Camp.

There were also other forms of measures practised in the Camp to minimise the possibility of blinds going undetected. One of such measures is for the Unit who uses any of the ranges for its target practices to clear the range of any unspent bullet at the end of each exercise and if this is not enough, the Range Wardens would also go around collecting expended items like casings, copper, lead and other items from the firing ranges. These items are then handed to the Quarter Master who keeps a record of all such collections and the items are then flattened down and sent to the Ordinance Depot in Kuala Lumpur.

An ammunition expert, DW2, was also called to establish the make and type of the bomb found by the plaintiff but since he was not shown a sample of the bomb and that there was hardly any investigations carried out by the first defendant over this accident and no report lodged, he could only make an educated guess that it could well have been a 2" mortar bomb and under such circumstances, I do not consider his evidence to be conclusive that the bomb was not of the type used by the second defendant in its target practices or of the type used by the British Army when the Camp was occupied by them. In this respect, his evidence was also contradicted by the plaintiff's immediate superior, DW4, the Assistant Range Liaison Officer who was at the scene, immediately after the bomb exploded in the plaintiff's hand and he, DW4, had handled the bomb and he described it as a rocket launcher, the type used by the British Army but not by the Malaysian Army.

The plaintiff testified that when he picked up the bomb he was not aware what it was or its potential danger. He admits that picking up the bomb was not part of his duties and for that matter, nothing would have brought him to the stream in the jungle area in the first place had it not been for the fact that the toilet at the Workshop had no running water. Here I pause to consider the plaintiff's objection that his employers, the defendants, had failed to provide him with the necessary amenities. I would not go that far to hold that there had been an act of omission on the part of the defendants as there was a toilet at the Workshop, the only thing that was not there that day was running water, a temporary inconvenience for which the plaintiff had to resort to using the stream.

As to whether the plaintiff had been given due notice or aware of the dangers at the camp, I have conflicting evidence on this. He had testified that during the nine months that he had been working in the Camp, he was not briefed by any of his superior officers of the dangers lurking in the Camp. He was not even shown pictures of what a bomb looks like whatmore knew of the procedure to be followed should he find one. His immediate superior officer, Onn bin Harun, who was the Assistant Range Liaison Officer, and who held the rank of Warrant Officer II, remembered calling the plaintiff into his office on 9 January 1975, a few days after the plaintiff had reported for duty and had briefed him of his duties as a driver and the risks and dangers that he may encounter working in the area especially the presence of undetected blinds and he was warned not to touch these if he should find them. DW4 had also jotted down the fact of this briefing in his dairy and had also shown him pictures of the different types of weaponary used on the ranges.

The plaintiff's other superior officer was DW3, the Range Liaison Officer, who held the rank of a Captain. He was also the Adjutant of the Camp and the Technical Advisor to the first defendant. As the chief administrative officer of the Camp, one of his duties was to see to the safety clearance of the ranges and the safety of the Army personnel but not of the civilian staff who comes directly under the supervision and control of the Higher Executive Officer. Although he was not duty bound to explain safety precautions to the plaintiff who was one of the 12 to 15 civilians that were allotted to him, he had nonetheless done so once when he first took over duties as the Range Liaison Officer in early 1975. Apart from this lecture, he had, on two other occasions, when he was driven by the plaintiff, warned him of the dangers of picking up a blind.

When cross-examined as to whose responsibility it was to explain safety precautions to the civilians and military staff, DW3, reluctantly admitted that was his sole responsibility as the Range Liaison Officer, but as the organisation of the Camp was so big, he had delegated that part of his responsibility as far as civilian staff under his command was concerned to the Higher Executive Officer. Unfortunately, as the Higher Executive Officer was not called to testify, there is no knowledge whether there had been a proper delegation of such a responsibility and if there had been, whether such a responsibility had been faithfully carried out by the Higher Executive Officer concerned. If he had indeed delegated such a responsibility to the Higher Executive Officer, in all probability, DW3, would not be bothered to take upon the task of explaining safety precautions to his civilian staff and to that extent, I had my own doubts over his avowed sense of duty in giving that one lecture on the safety precautions to the plaintiff in early 1975 or of the warnings he gave the plaintiff when he was travelling as a passenger in the plaintiff's vehicle.

Turning now to DW4's evidence, I find it highly suspicious that his diary should only record the briefing he gave the plaintiff on 9 January 1975, but not other daily happenings at the Camp. Apart from this entry, the diary has not been properly maintained and even the fact of an unusual event of the plaintiff being injured in the explosion remain unrecorded in his diary. He did not even produce the pictures that he had allegedly shown to the plaintiff illustrating the different types of weaponary used at the ranges and neither is the fact that he had made use of such visual aid been recorded in the entry of 9 January 1975, the writings of which have been superimposed, as the diary was wet. Moreover the use of visual aids to illustrate the different types of weaponary used at the Camp have always been discouraged for security reasons and it does not therefore stand to reason that DW4, a soldier, would go against an order by showing pictures of the weapons used at the Camp to the plaintiff.

Having considered the evidence of both DW3 and DW4 at great length, I find that in all probability, both had reached the same negative attitude that since the plaintiff was only one of the 12 or 15 civilians under their control, and the nature of his work was in no way dangerous and the possibility of blinds being detected outside the target areas is minimal, there was no necessity for any safety precautions to be explained to him. For that matter too there was hardly any notice displayed on the notice board warning the staff of the dangers in the Camp except for the danger notice shown in AB2 at pp. 21 and 22 which DW1 admitted were put up in 1976 and are notices for persons intending to come into the Camp and has no bearing to those working in the Camp. A notice warning all the civilian staff not to touch any object found in the Camp was issued by the first defendant as shown at AB2 of p. 13 but I consider that this notice came too late in the day as this was dated 15 August 1975, the day after the plaintiff met with the accident, and displayed at about the same time and which came to the plaintiff's attention after he reported back to work after his

hospitalisation for his injuries. Thus as far as the notice of dangers lurking in the area is concerned, I find that there are insufficient and inconclusive evidence to show that the plaintiff had been warned of such dangers.

The plaintiff had also testified that the purpose of him carrying the object back to the Workshop was to hand it to DW4 so that it could be sold and the proceeds deposited in the Fund set up for the benefit of all civilian staff at the Camp. The money in the Fund was available to them as loans. He maintains that the Fund was set up on 13 June 1975 following a meeting called by DW3 and DW3 had informed the civilian staff present that the money for the Fund would come from the collections of anything metallic found in the Camp that could be sold. The Fund started with an initial deposit of RM100 in the Malayan Banking, Johor Baru, in the name of Hassan bin Maluri, a civilian clerk and DW3's Orderly. The plaintiff remembered driving Hassan to Johor Baru on the instructions of DW4 to open the account, number 12054. He also alleged that he received a donation of RM50 from this Fund whilst he was in the hospital and he was asked to acknowledge receipt of it which he did through a representative as shown in P7.

DW3 denied knowledge of the Fund or that he initiated the launching of it. Likewise he denied knowledge of the donation of RM50 from the Fund but when he was confronted with P7, he confirmed that DW4 had signed on his behalf. DW4 also denied knowledge of the Fund or that he had instructed the plaintiff to drive his former clerk, Hassan, to Johor Baru to open the account. He however admitted signing P7 and asking the plaintiff to acknowledge it but denied the RM50 came from the Fund as he had personally collected the amount from the various members of the staff.

Although Harun bin Maluri was available to be subpoenaed by the plaintiff, the defendants however agreed that his presence in Court was not necessary and that his absence should not be taken adversely against the plaintiff. That being the case and in view of the evidence, I am satisfied that at the material time there was a Fund in existence which was set up solely for the benefit of the civilian staff. Although both DW3 and DW4 denied knowledge of such a Fund, or that they had a hand in its creation and management, I find their assertions of innocence difficult to accept for the following reason. The Fund's only source of income is from the proceeds of sale of empty casings or other metallic objects found and collected by the civilian staff. From the evidence of both DW1 and DW3, such items are the property of the second defendant and they can only be collected by 2 categories of persons, namely the Unit using the ranges for its practice exercises at the end of each exercise and by the Range Wardens and these officers are accountable for such collections to the Quarter Master who then sent them to the Ordnance Depot in Kuala Lumpur. These metallic casings cannot leave the Camp under any other circumstances and neither can they be sold. That being the case, the creation of the Fund itself was an illegal act and it is no wonder that both DW3 and DW4 are quick to deny any knowledge of such a Fund, for on their own, I doubt very much that the civilian staff can be enterprising enough.

Then again if the RM50 donation received by the plaintiff was in fact a donation collected from the various members of the staff as a sympathetic gesture as DW4 makes it to be, why was there a necessity for the plaintiff to acknowledge receipt of it. Under normal circumstances, a donation given under such conditions would be replied with the gracious "thank you", definitely not a formal acknowledgment, as is done in P7, unless of course, the money came from the Fund itself in which case, P7 is necessary as evidence of such a gift. Considering the evidence in its entirety I hold that the RM50 came from the Fund and this also explains why P7 was signed by DW4 on behalf of DW3. To that extent, DW3 and DW4

could not possibly be telling the truth when they denied any knowledge of the Fund and that they were very much aware that by launching and managing the Fund, they were doing something illegal. However, such illegality on the part of his master has no effect on the plaintiff and when he picked up the unexploded bomb, he had the express authority to do so as he considered it an expensive item which can be sold and the proceeds deposited with the Fund and to that extent, I hold the defendants liable for the consequences that followed.

Having held the defendants liable for negligence at common law, can the defence of *volenti non fit injuria* apply as to enable the defendants to escape liability altogether? For this doctrine to apply, the defendants must establish that the plaintiff must have been aware of the dangers and risks that he had placed himself and that he had consented to run such risks. In this case, when the plaintiff picked up the bomb, there is no evidence to show that he was aware that it was a live-bomb, and I very much doubt that he would go anywhere near it had he even suspected that it was a bomb. Since he was not even aware of the presence of danger, it can hardly be said that he had consented to run such danger and to that extent, the doctrine has no application to the facts of this case.

Lastly, I come to consider whether the plaintiff had in any way contributed to the negligent act. In this case, the bomb would not have exploded had it not hit the cement floor of the open drain when the plaintiff tripped into it. By being careless himself, I hold that the plaintiff had contributed to his own misfortune and to that extent I apportion liability at 50:50.

As a result of this accident, the plaintiff suffered the following injuries.

(1) Amputation to his left hand above the wrist resulting in the loss of use of the full function of the left arm and forearm. He now wears a prosthetic arm with very little useful function. For this injury I was referred to the following cases.

(i) *Lee Song Seng v. Leong Hup Transport Company & Anor.* [1975] 2 MLJ ii where RM32,000 was awarded for an amputation of the left elbow in 1974.

(ii) *Jamaliah binti Mohamad (infant) v. Ng Fook Seng* [1982] 2 MLJ xlvii where RM40,000 was awarded in 1980 for a crush injury to the right hand which had left it essentially functionless other than the retention of sensation.

These two cases were decided in Singapore where awards tend to be on the higher side. Counsel for the plaintiff has urged me that RM50,000 would be a fair sum to award, bearing in mind that these two cases were decided earlier in point of time, but I consider that RM40,000 would be a fair and reasonable sum for pain and suffering and loss of amenities.

(2) Amputation to the thumb, index and middle fingers of the right hand, thereby disabling the plaintiff from having a good grip or making a fist. Counsel for the plaintiff urged me to award a sum of RM40,000 for this injury based on *Jamaliah's* case above, but in that case, Jamaliah lost the total use of her right hand. In this case, the plaintiff has still the use of his right ring and little fingers which show full mobility. For this injury, I award a sum of RM20,000.

(3) Fracture of the right tibia which has united and there is no shortening. In *Abdul Hamid v. Ooi Teik Ean & Another* [1979] 1 MLJ 244, RM13,000 was awarded in 1978 for ½" shortening and in *Gary Louis Powell v. Ng Cheng Tee* [1979] 1 MLJ xxxix for 1 cm. shortening, RM17,000 was awarded in 1978. As the plaintiff suffered no residuals, I award a sum of RM12,000 for this injury.

(4) Multiple small injuries especially all over the front and requiring skin grafting to the right thigh which now shows a healed irregular scar measuring 6½" x 6½". Scars are also present at the left thigh measuring 11" x 3½", at the lower left thigh measuring 3½" x 3", over the right thigh measuring 2" x 1", at the front of the right shin measuring 2" x 1", and over the dorsum of the penis measuring ½" long. Although most of the larger foreign bodies have been removed an X-Ray examination still shows that there are still small metal fragments in the right arm, body, legs and left foot of the plaintiff. For these injuries, I award a sum of RM20,000.

(5) Wound at dorsum of left foot which required the amputation of the second left toe. For this injury, I consider RM5,000 to be reasonable under the circumstances.

Thus for general damages alone, based on 100% liability, the total award adds up to RM97,000. As I have already apportioned liability equally between the parties, there will be judgment to the plaintiff for RM48,500 as general damages, interest at 6% per annum from service of the writ of summons until today.

The plaintiff claims only 2 items of special damages namely (1) loss of earning capacity, and (2) costs of prosthesis and costs of servicing the same.

Because of his injuries, the plaintiff is now put to do light work and although he suffers no loss of income, the defendants concede that he is entitled to loss of earning capacity for which I allow a lump sum award of RM5,000. Costs of prosthesis and charges for servicing have been agreed between the parties for following sums:

(1) Right hand at RM10,640

(2) Left hand at RM7,934

(3) Service charges at RM5,600

The parties have also agreed that interest will not be chargeable on these agreed sums. As all these sums are based on 100% liablity, the amounts are accordingly halved by virtue of the apportionment of liability and judgment is entered for the plaintiff in the sum of RM2,500 being loss of earning capacity and RM12,087 being the costs of prosthesis and costs of servicing the same. Lastly the plaintiff is to have the costs of this suit in any event.

Also found at [1985] 2 CLJ 286